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11  
12

13 **THE UNITED STATES DISTRICT COURT  
14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

15 UNITED STATES OF AMERICA, ) Case No. 08 CR 0203-MLH  
16 )  
17 Plaintiff, ) **DEFENDANT'S NOTICE OF MOTION**  
18 v. ) **AND MOTION FOR DISCOVERY AND**  
19 RAFAEL ALFONSO LABASTIDA- ) **FOR LEAVE TO FILE ADDITIONAL**  
20 OLACHEA, ) **MOTIONS**  
21 )  
22 Defendant. ) **Date: February 25, 2008**  
23 ) **Time: 2:00 p.m.**  
24 )

25 **TO: KAREN P. HEWITT, UNITED STATES ATTORNEY AND WILLIAM HALL,**  
26 **ASSISTANT UNITED STATES ATTORNEY:**

27  
28 **PLEASE TAKE NOTICE** that on February 25, 2008, at 2:00 p.m., the defendant,  
29 Rafael Alfonso Labastida-Olachea (hereinafter Mr. Labastida), by and through his counsel,  
30 Ezekiel E. Cortez, will move this Court to grant the motions listed above.

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## MOTION

Through his counsel, Ezekiel E. Cortez, and pursuant to Federal Rules of Criminal Procedure 12 and 16, the Fifth and Sixth Amendments to the United States Constitution, 18 U.S.C. § 3501, and applicable local rules, Mr. Labastida hereby moves this Court to grant his motions for discovery and for leave to file additional motions.

These motions are based upon the instant motion and notice of motion, the attached statement of facts and memorandum of points and authorities, the files and records in this case, and all other matters which may be brought to this Court's attention before or during the hearing of this motion.

Respectfully submitted,

Dated: 11 February 2008

/S/Ezekiel E. Cortez  
Ezekiel E. Cortez  
Attorney for Defendant  
Rafael Alfonso Labastida-Olachea

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Attorneys for Defendant: Rafael Alfonso Labastida-Olacheas

**THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

I.

## STATEMENT OF FACTS

According to the Government's Probable Cause Statement, on January 10, 2008, Mr. Labastida attempted to enter the United States at the Otay Mesa Port of Entry via the pedestrian entrance. Mr. Labastida presented his Permanent Resident card. The CBP Officer conducted a name check through the CBP computer system and received a computer generated referral. The Officer then took Mr. Labastida to secondary where he obtained Mr. Labastida's fingerprints and allegedly identified Mr. Labastida as a criminal alien that had previously been removed from the United States. Mr. Labastida was then referred to the Prosecution Unit for further processing.

1 A videotaped interview was then conducted. The Immigration Central Index System  
2 and the Deportable Alien Control System allegedly revealed that Mr. Labastida is a Mexican  
3 citizen with no legal documents to enter the United States. It also revealed that on or about  
4 August 1, 1995, Mr. Labastida was deported from the United States. It further revealed that  
5 Mr. Labastida was last removed from the United States to Mexico on or about August 25,  
6 2003.

7 **III.**

8 **MOTION FOR DISCOVERY**

9 Pursuant to the Fifth and Sixth Amendments to the United States Constitution, the  
10 dictates of *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), *Brady v. Maryland*, 373 U.S. 83 (1963),  
11 *United States v. Agurs*, 427 U.S. 97 (1976), *United States v. Bagley*, 473 U.S. 667 (1985), and  
12 Fed. R. Crim. P. 16, Mr. Labastida respectfully moves for an entry of an order requiring the  
13 government to disclose and provide the following specific information and material known, or  
14 that with the exercise of due diligence should be known to the government. Mr. Labastida  
15 requests the government to disclose, and in the case of tangible items, produce for inspection  
16 and copying, all evidence in its possession, custody or control which may be relevant to the  
17 issues of guilt or innocence or mitigation at sentencing, or which could lead to such material  
18 or favorable evidence. Such disclosure and production is to include, but is not limited to:

19 **REQUEST NO. 1**

20 Mr. Labastida specifically requests that all videotapes, dispatch tapes, or any other  
21 physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody  
22 or care of the government and which relate to the arrest or the events leading to the arrest in  
23 this case be preserved.

**REQUEST NO. 2**

All arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding Mr. Labastida's arrest. This request includes, but is not limited to any rough notes, records, reports, transcripts or other documents in which statements of Mr. Labastida or any other discoverable material is contained.

**REQUEST NO. 3**

Specific dates and times when Mr. Labastida was interviewed or contacted by any agent of the United States. This request includes a request for all memoranda, reports, recordings, photographs and/or any other record made of such contacts and the substance of any conversations.

**REQUEST NO. 4**

All documents and tangible objects, including, but not limited to videotapes, recordings, transcripts, reports or notes relating or referring to, or constituting, containing or reflecting any statement by Mr. Labastida, written, recorded, or oral, whenever and to whomever made.

**REQUEST NO. 5**

With regard to all conversations within the scope of Request No. 2, Mr. Labastida requests production of:

- (a) the name & address of the person to whom such statement was made;
- (b) the name of the person making the statement;
- (c) the date on which the statement was made; and
- (d) the location where the statement was made.

**REQUEST NO. 6**

1 The substance of any oral statement, which the government intends to offer in  
2 evidence at the trial, made by Mr. Labastida, whether before or after his arrest, in response to  
3 interrogation by any government agency.  
4

**REQUEST NO. 7**

6 All recorded conversations, electronic, mechanical, stenographic, or otherwise, of any  
7 person, whether or not acting on behalf of the government, which is relevant to the subject  
8 matter charged in the indictment in this case, and which is in the possession, custody, or  
9 control of the government, within the meaning of 18 U.S.C. § 3504.  
10

**REQUEST NO. 8**

12 All books, papers, documents, photographs, tangible objects, or copies or portions  
13 thereof, which are within the possession, custody or control of the government, and which are  
14 material to the issue of guilt or innocence or are mitigating for sentencing as downward  
15 adjustments and/or 3553(a) factors, or are intended for use by the government as evidence in  
16 chief at the trial.  
17

**REQUEST NO. 9**

20 All books, papers, documents, photographs, tangible objects, copies or portions  
21 thereof, which were obtained from Mr. Labastida or which belong to him.  
22

**REQUEST NO. 10**

24 All videotapes, or other aural and visual recordings, transcripts thereof, investigative  
25 reports, summaries, memoranda and/or notes relating or referring in any way, directly or  
26 indirectly to Mr. Labastida and the instant charges.  
27

**REQUEST NO. 11**

1 All results or reports of physical or mental examinations, and or scientific tests or  
2 experiments or copies thereof, which are within the possession, custody or control of the  
3 government, the existence of which is known, or by the exercise of due diligence may become  
4 known, to the attorney for the government, and which are material to the issue of guilt or  
5 innocence or are intended for use by the government as evidence in chief at the trial.  
6

7 **REQUEST NO. 12**

8 All videotapes, recordings, transcripts, photographs, diagrams, charts, or other  
9 demonstrative evidence to be offered by the government in the trial of this case or relating to  
10 the offenses charged.  
11

12 **REQUEST NO. 13**

13 All documents that describe contacts of whatever sort made by federal agents, or any  
14 state, local or foreign agents, involved in the investigation of this case, or any other  
15 individuals cooperating with the government in the investigation of this case.  
16

17 **REQUEST NO. 14**

18 All documents, tangible objects, or other information which will tend to exculpate Mr.  
19 Labastida of any of the allegations in the Indictment, or that will be favorable to him, or could  
20 reasonably weaken or overcome testimony adverse to Mr. Labastida given by government  
21 witnesses, including, but not limited to:  
22

23 (a) All documents, tangible objects, or information tending to show or indicate that  
24

25 Mr. Labastida did not *knowingly or intentionally* commit any or all of the offenses  
26 charged against his;  
27

28 (b) The names and address of any persons who have evidence, documents, tangible  
29 objects or information tending to exculpate Mr. Labastida of any allegations in the  
30

1 indictment, or who have evidence, documents, tangible objects or information which  
2 can reasonably weaken or overcome testimony adverse to the defendants given by any  
3 government witness; and  
4

5 (c) The names of all persons interviewed by Government agents and other employees  
6 of the Justice Department, or by agents of any state or local agency or agents of any  
7 foreign government for whom there are no interview reports, together with a report  
8 showing whether notes of the interview were taken contemporaneously with the  
9 interview or subsequently, and if so, whether the notes were destroyed.  
10

11 **REQUEST NO. 15**

12 Names and addresses of all persons that the government intends to call as witnesses at  
13 trial, together with their statements, whether they are recorded or not.  
14

15 **REQUEST NO. 16**

16 All documents, tangible objects, and other information relating or referring to, or  
17 constituting, containing, reflecting or suggesting any bias or hostility of any witness for the  
18 government concerning this investigation.  
19

20 **REQUEST NO. 17**

21 Copies of all documents containing allegations of fraud, deceit, perjury, or lack of  
22 candor concerning any person the government intends to call as a witness.  
23

24 **REQUEST NO. 18**

25 The conviction record of all persons the government intends to call as witnesses at the  
26 time of trial, which convictions were punishable by death or imprisonment in excess of one  
27 year under the law under which the conviction was obtained, or which involved dishonesty or  
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false statements, regardless of the punishment, within the meaning of Federal Rule of Evidence 609(a).

## **REQUEST NO. 19**

All documents, tangible objects or other information relating to the testimony of witnesses whom the government will call at trial, which documents, tangible objects, or information reflects materials that in any way contradict or are inconsistent with the anticipated trial testimony of the witnesses.

**REQUEST NO. 20**

Identify the dates, times, and locations of all prior testimony regarding events of this case by any person the government intends to call as a witness at the time of trial.

## REQUEST NO. 21

- (a) All evidence, documents, tangible objects, and other information exculpatory to Mr. Labastida, or favorable to him, or which could reasonably weaken or overcome testimony adverse to him given by any person, which was submitted to the grand jury for its consideration prior to the return of the indictment in this case;
- (b) A list of the names of all witnesses appearing before the grand jury in connection with its investigation of the present case; and
- (c) The names of all persons designated or sworn as grand jury agents or to whom grand jury material has been disclosed pursuant to the provisions of Rule 6 of the Federal Rules of Criminal Procedure.

Mr. Labastida requests that the above materials be made available to counsel as soon as possible after the hearing on these motions in order to allow adequate time for review and to seek further discovery or to file such pretrial motions as may be appropriate.

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IV.  
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LEGAL BASIS FOR REQUEST  
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Both the Federal Rules of Criminal Procedure and long-standing precedent dictate that  
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Mr. Labastida is entitled to timely discovery production by the government. According to the  
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United States Supreme Court –  
89  
Under the Due Process Clause of the Fourteenth Amendment,  
10 criminal prosecutions must comport with prevailing notions of  
11 fundamental fairness. We have long interpreted this standard of  
12 fairness to require that criminal defendants be afforded a  
13 meaningful opportunity to present a complete defense. To  
14 safeguard that right, the Court has developed ‘what might  
15 loosely be called the area of constitutionally guaranteed access  
16 to evidence.’ *United States v. Valenzuela-Bernal*, 458 U.S. 858,  
867 (1982). Taken together, this group of constitutional  
privileges delivers exculpatory evidence into the hands of the  
accused, thereby protecting the innocent from erroneous  
conviction and ensuring the integrity of our criminal justice  
system.17  
*California v. Trombetta*, 467 U.S. 479, 485 (1984).18  
The constitutionally guaranteed access to evidence includes a duty upon the  
19 government to disclose false testimony, false evidence and to turn over evidence that a  
20 witness has lied under oath. See *Napue v. Illinois*, 360 U.S. 264, 269-272 (1959)- “It is of no  
21 consequence that the falsehood bore upon the witness’ credibility rather than directly upon  
22 defendant’s guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to  
23 the case, the district attorney has the responsibility and duty to correct what he knows to be  
24 false and elicit the truth.”  
2526  
Furthermore, “criminal defendants are entitled to much more than protection against  
27 perjury.” *Trombetta*, 467 U.S., at 485. Another important constitutionally protected privilege  
28 for the defendant is the right to request and obtain evidence from the prosecution that is  
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1 material to either guilt or punishment of the defendant. See *Brady v. Maryland*, 373 U.S. 83  
 2 (1963)- “Suppression by the prosecution of evidence favorable to an accused who has  
 3 requested it violates due process where the evidence is material either to guilt or to  
 4 punishment, irrespective of the good faith or bad faith of the prosecution.” Even in the  
 5 absence of a specific request, the prosecution has a constitutional duty to turn over  
 6 exculpatory evidence that would raise a reasonable doubt about the defendant's guilt.  
 7 *Trombetta*, 467 U.S., at 485 citing *United States v. Agurs*, 427 U.S. 97, 112 (1976). Evidence  
 8 favorable to the accused includes material that bears on the credibility of witnesses and  
 9 includes impeachment evidence. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th  
 10 Cir. 1992). “The jury's estimate of the truthfulness and reliability of a given witness may well  
 11 be determinative of guilt or innocence, and it is upon such subtle factors as the possible  
 12 interest of the witness in testifying falsely that a defendant's life or liberty may depend.”  
 13 *Napue*, 360 U.S., at 269.

14 The government is under an obligation to seek out and disclose *Brady* evidence even if  
 15 the evidence is not in its immediate possession. As stated by the Supreme Court – “The  
 16 individual prosecutor has a duty to learn of any favorable evidence known to the others acting  
 17 on the government's behalf in the case, including the police. But whether the prosecutor  
 18 succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good  
 19 faith or bad faith, see *Brady*, 373 U.S. at 87), the prosecution's responsibility for failing to  
 20 disclose known, favorable evidence rising to a material level of importance is inescapable.”  
 21 *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995). Therefore, Mr. Labastida is entitled to the  
 22 above requested evidence whether it is in the possession of the prosecution, Homeland  
 23 Security, or any other agency of the government. See *Giglio v. United States*, 405 U.S. 150,  
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1 154 (1972)- “The prosecutor's office is an entity and as such it is the spokesman for the  
2 Government.” Further, “An individual prosecutor is presumed...to have knowledge of all  
3 information gathered in connection with his office's investigation of the case...” *United States*  
4 *v. Avellino*, 136 F.3d 249, 255 (2d. Cir. 1998).  
5  
6

7 **CONCLUSION**

8 For all of the foregoing reasons, Mr. Labastida requests this Court to grant his Motion  
9 for Discovery and for leave to file additional motions after the government has produced, and  
10 Mr. Labastida has had an opportunity to review, further discovery in this case.  
11  
12

13 Respectfully submitted,  
14

15 Dated: 11 February 2008

16 /S/Ezekiel E. Cortez  
17 Ezekiel E. Cortez  
18 Attorney for Defendant  
19 Rafael Alfonso Labastida-Olachea  
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8 Attorneys for Defendant: Rafael Alfonso Labastida-Olachea  
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10 **THE UNITED STATES DISTRICT COURT  
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 UNITED STATES OF AMERICA, ) Case No. 08 CR 0203-MLH  
13 Plaintiff, )  
14 v. ) **DEFENDANT'S PROOF OF SERVICE**  
15 RAFAEL ALFONSO LABASTIDA- )  
16 OLACHEA, )  
17 Defendant. )  
18 \_\_\_\_\_

19 I, the undersigned, hereby declare as follows:  
20

- 21 1. I am over 18 years of age, a resident of the County of San Diego, State of California,  
22 counsel for the Defendant and that my address is 1010 Second Avenue, Suite 1850,  
23 San Diego, CA 92101;
- 24 2. That today I served Defendant's Notice of Motion and Motion For Discovery and For  
25 Leave to File Additional Motions on opposing counsel by causing to be delivered by  
26 e-filing to the Office of the Clerk; and that I mailed a copy to Defendant.

27 I declare under penalty of perjury that the foregoing is true and correct.  
28

29 Dated: 11 February 2008

30 /S/Ezekiel E. Cortez

Ezekiel E. Cortez